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January 4, 2024

President Joe Biden
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Biden:

The time has come for you to select a new nominee to head the Department of Labor (DOL). At noon on January 3, 2024, the first session of the 118th Congress ended and the second session began. At that time, the Senate returned the nomination of Deputy Secretary of Labor Julie A. Su to serve as Secretary of Labor. With the Senate's return of Ms. Su's nomination, we are requesting that you nominate someone else to head DOL and that you designate a different Acting Secretary of Labor.

Senate Rejection

On February 16, 2023, the Honorable Martin J. Walsh announced his intention to resign his position as Secretary of Labor.¹ Prior to Secretary Walsh's resignation, on February 28, 2023, you nominated Deputy Secretary Su to become Secretary of Labor.² On March 11, 2023, with the resignation of Secretary Walsh, Deputy Secretary Su became the Acting Secretary of Labor.³ On July 20, 2023, Ms. Su became the longest pending cabinet nominee, when the same party controls the White House and the Senate, dating to 1857.⁴ Ms. Su has proven to be a controversial nominee and has not secured enough support in the Senate to have her nomination approved. Consequently, the highest position at DOL continues to be held by an official who does not have enough support to be confirmed to lead the agency on a permanent basis.

¹ Nick Niedzwiadek, *It's Official: Labor Chief Walsh Jumps Ship For Hockey Players' Union*, POLITICO, Feb. 16, 2023, <https://www.politico.com/news/2023/02/16/labor-secretary-walsh-hockey-step-down-00083299>.

² Press Release, The White House, President Biden Nominates Julie Su for Secretary of the Department of Labor (Feb. 28, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/28/president-biden-nominates-julie-su-for-secretary-of-the-department-of-labor/>.

³ DOL, ACTING SECRETARY OF LABOR JULIE A. SU, <https://www.dol.gov/agencies/osec>.

⁴ Memorandum from Kathleen E. Marchsteiner, Cong. Res. Serv., on Longest Presidentially-Appointed, Senate-Confirmed Cabinet Nominations in the Senate Since 1857 (Sept. 25, 2023) (on file with Committee).

Ms. Su's Failures

Many of the objections to Ms. Su's nomination come from her service as Secretary for the California Labor and Workforce Development Agency from 2019 until 2021. Ms. Su's tenure as California Secretary of Labor was mired in mismanagement, allowing fraudsters to steal \$32 billion in unemployment insurance from California taxpayers.⁵ Ms. Su was also the chief enforcer of AB 5, a California law that mirrors current federal anti-worker proposals like H.R. 20, the *Richard L. Trumka Protecting the Right to Organize Act* (PRO Act), and DOL's proposed independent contractor rule.⁶ AB 5 denied workers the freedom to earn a living as they choose, costing thousands of workers their jobs.⁷

As Deputy Secretary of Labor, Ms. Su helped impose an Occupational Safety and Health Administration workplace COVID-19 vaccination and testing mandate.⁸ If this employer mandate had not been struck down by the Supreme Court, it would have applied to nearly 84 million workers.⁹ Not only was DOL wrong on the science of COVID, but its sweeping COVID dictates also compromised the economic supply chain. In promulgating the mandate, as the Supreme Court ruled, Ms. Su attempted to impose an unconstitutional vaccination rule on American workers.

As Acting Secretary of Labor, Ms. Su has continued to pursue a radical agenda against that of the American worker. On December 6, 2023, the Office of Management and Budget published the Fall 2023 Regulatory Agenda that outlines DOL's plans to prepare, write, or finalize 75 regulations over the next year.¹⁰ Additionally, DOL's long-term agenda—which provides an outlook beyond the next 12 months—includes an additional 20 items.¹¹ As “Bidenomics” continues to fail workers, families, and the economy, further regulatory actions led by Acting Secretary Su will continue to undermine America's workforce.

Under Acting Secretary Su's leadership, DOL has demonstrated a clear and persistent disregard for Congress' role in conducting oversight. Under her leadership, a majority of DOL's responses to the Committee on Education and the Workforce's (Committee) inquiries have been vague, providing none of the requested documents and failing to provide anything close to a complete response. Just days before her scheduled appearance to testify before the Committee on June 7,

⁵ David Manoucheri, *Analysis Shows California EDD Fraud At \$32.6 Billion*, KCRA, Oct. 6, 2022, <https://www.kcra.com/article/analysis-edd-fraud-326-billion-and-counting/41281662>.

⁶ See Judy Lin, *CA's Labor Chief Wants the Jobs of the Future — and She Wants Them to Cut Inequality*, CALMATTERS, Oct. 16, 2019, <https://calmatters.org/economy/2019/10/california-labor-chief-jobs-future-income-inequality-julie-su-ab5-gig-economy-unions/>.

⁷ See, e.g., *Examining Biden's War on Independent Contractors: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 118th Cong. (2023) (statement of Karen Anderson, Founder, Freelancers Against AB5).

⁸ COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021).

⁹ NFIB v. OSHA, 142 S. Ct. 661 (2022); News Release, OSHA, US Department of Labor Issues Emergency Temporary Standard to Protect Workers from Coronavirus (Nov. 4, 2021), <https://www.osha.gov/news/newsreleases/national/11042021>.

¹⁰ OFF. OF MGMT. & BUDGET, FALL 2023 UNIFIED AGENDA OF REGULATORY AND DEREGULATORY ACTIONS, <https://www.reginfo.gov/public/do/eAgendaMain>.

¹¹ *Id.*

2023, she attempted to cancel, ultimately appearing only because of my threat to issue a subpoena.

Most recently, following DOL's repeated failures to provide requested information about the propriety of its use of taxpayer funds for an event held just prior to the 2022 elections, on November 21, 2023, the Committee issued a subpoena to Acting Secretary Su.¹² (This was the first subpoena the Committee served DOL since 2008.) On December 6, 2023, DOL failed to comply with the subpoena by neither providing responsive materials nor coming to an agreement to revise the terms of the subpoena. Subsequent information provided to the Committee was incomplete and succeeded in preventing the Committee from fulfilling its constitutional duties.¹³

Questionable Legal Interpretation

All the while, you have continued to keep Ms. Su as the head of DOL by applying a questionable interpretation of the law. Your administration claims to be using its authority under the Deputy Secretary of Labor statute¹⁴ instead of the *Federal Vacancies Reform Act of 1998 (Vacancies Act)*.¹⁵ Under this interpretation, Ms. Su may serve as Acting Secretary until her own nomination or the nomination of someone else is approved by the Senate.

There are two federal statutes governing an Acting Secretary of Labor's tenure: the Deputy Secretary of Labor statute—a 1946 law that created the position of Deputy Secretary of Labor—and the *Vacancies Act*. The Deputy Secretary of Labor statute allows the Deputy Secretary of Labor to serve as Acting Secretary until a new Secretary is confirmed by the Senate. Specifically, the Deputy Secretary of Labor statute provides the following:

[T]he Deputy Secretary shall (1) in case of the death, resignation, or removal from office of the Secretary, perform the duties of the Secretary until a successor is appointed, and (2) in case of the absence or sickness of the Secretary, perform the duties of the Secretary until such absence or sickness shall terminate.¹⁶

In contrast, the *Vacancies Act* sets specific time limitations on service: it allows a person to serve as an acting officer “for no longer than 210 days beginning on the date the vacancy occurs” unless “a first or second nomination for the office is submitted to the Senate,” in which case the person may serve “from the date of such nomination for the period that the nomination is

¹² Subpoena from Chairwoman Virginia Foxx to Acting Sec'y of Lab. Julie A. Su (Nov. 21, 2023), https://edworkforce.house.gov/uploadedfiles/osha_subpoena_updated.pdf.

¹³ Letter from Liz Watson, Asst. Sec'y for Cong. & Intergov'tal Aff., DOL, to Chairwoman Foxx (Dec. 14, 2023) (on file with Committee).

¹⁴ 29 U.S.C. § 552.

¹⁵ 5 U.S.C. §§ 3345–3349c; DOL, SUBMISSION UNDER THE FEDERAL VACANCIES REFORM ACT (Mar. 21, 2023) (on file with Committee); Max Kutner, *DOL Says Julie Su Can Run Agency Without Senate Approval*, LAW360, June 2, 2023, <https://www.law360.com/employment-authority/articles/1684354/dol-says-julie-su-can-run-agency-without-senate-approval>.

¹⁶ 29 U.S.C. § 552.

pending in the Senate.”¹⁷ If a first nomination is rejected or returned by the Senate, the acting position may continue for another 210 days or during the pendency of a second nomination. If that second nomination is rejected or returned by the Senate, the acting position ends after 210 days.¹⁸

Your administration’s questionable interpretation relying on the Deputy Secretary of Labor statute caused the Committee to take legislative action on September 14, 2023, when it favorably reported H.R. 4957, the *Department of Labor Succession Act*. This bill ensures that the Deputy Secretary of Labor cannot serve indefinitely as the Acting Secretary of Labor by clarifying that the *Vacancies Act* is the statute governing a temporary vacancy within the office of the Secretary of Labor.

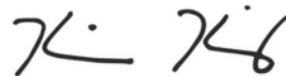
Conclusion

Ms. Su has been dubbed “Biden’s forever nominee.”¹⁹ It is easy to see why. Ms. Su’s nomination has languished because her disastrous background and policy goals have failed to garner the support of a majority of senators. By failing to take the Senate’s inaction on Ms. Su’s nomination as a sign that it is unacceptable to the American people, you have ignored the separation of powers vital to the Constitution. It is time for you to remedy this travesty. Accordingly, we respectfully request you select a new nominee to become the next Secretary of Labor and that you end Ms. Su’s tenure as Acting Secretary of Labor.

Sincerely,



Virginia Foxx
Chairwoman



Kevin Kiley
Chairman
Subcommittee on Workforce Protections

¹⁷ 5 U.S.C. § 3346(a); *see generally* VALERIE C. BRANNON, CONG. RESEARCH SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW (2018), <https://crsreports.congress.gov/product/pdf/R/R44997/4>.

¹⁸ 5 U.S.C. § 3346(b).

¹⁹ Hans Nichols & Stef W. Kight, *Biden’s Forever Nominee*, AXIOS, July 13, 2023, <https://www.axios.com/2023/07/13/julie-su-labor-secretary-biden-nomination>.